

**STATE OF WISCONSIN**  
**Department of Industry, Labor & Human Relations**

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Anne Marie Peters,

Appellant

vs.

PECFA Claim 954491-9795-97

SECRETARY,  
Department of Industry,  
Labor & Human Relations,

Respondent.

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Final Decision

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**P R E L I M I N A R Y   R E C I T A L S**

Pursuant to a petition for rehearing filed September 29, 1993, under § 101.02(6)(e), Wis. Stats., and §ILHR 47.53, Wis. Adm. Code, to review a decision by the Department of Industry, Labor and Human Relations, a hearing was held on January 20, 1994, at Green Bay, Wisconsin.

The issues for determination are

1. Whether the department's decision to deny petitioner's claim for Petroleum Environmental Cleanup Fund Act (PECFA) reimbursement based on § 101.433 (4)(g)2., Stats., was reasonable. The subissue is whether the claim can be considered fraudulent when all the invoices submitted as part of the claim were correct.
- 2 . Whether the cost item for the tank removal by Cruzwood Landscaping in the amount of \$2225.00 is eligible for reimbursement.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Anna Marie Peters  
128 N. Taylor Street  
Green Bay WI  
by: Attorney James Sickel  
P O Box 1626  
Green Bay WI 54305-1626

Department of Industry, Labor and Human Relations  
201 East Washington Avenue  
P.O. Box 7946  
MADISON WI 53707-7946  
By: Miles Mickelson, PECFA Coordinator  
Bureau of Petroleum Inspection & Fire Protection  
P O Box 7969  
Madison WI 53707-7969

The Hearing Examiner issued a Proposed Decision dated September 13, 1994, and the parties were provided an opportunity to file objections. Both parties waived the opportunity to file objections and requested that the file be submitted for final decision. The authority to issue a final decision in this matter has been delegated to the undersigned by order of the Secretary dated May 17, 1993.

The matter now being ready for decision, I hereby issue the following

### FINAL DECISION

The Proposed Decision dated September 13, 1994, is hereby adopted as the final decision of the department.

### NOTICE TO PARTIES

#### Request for Rehearing

This is a final agency decision under §227.48, Stats. If you believe this decision is based on a mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not discovered sooner through due diligence. To ask for a new hearing send a written request to Department of Industry, Labor & Human Relations, Office of Legal Counsel P. O. Box 7946, Madison WI 53707-7946.

Send a copy of your request for a new hearing to a the other parties named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the hearing examiner made and why it is important. Or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request will have to be denied.

Your request for a new hearing must be received no later than 20 days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in Sec. 227.49 of the state statutes

#### Petition For Judicial Review

Petitions for Judicial review must be filed no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one). The petition for judicial review must be served on the Department of Industry, Labor and Human Relations, Office of Legal Counsel 201 E. Washington Avenue, Room 400x, P. O. Box 7946, Madison WI 53707-7946.

The petition for Judicial review must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for judicial review is described in Sec. 227.53 of the statutes.

Signed and dated in Madison Wisconsin this 4th day of  
October, 1994,

Patrick J.- Osborne, Deputy Secretary  
Department of Industry, Labor & Human Relations  
P O Box 7946  
Madison WI 53707-7946  
Telephone: 608-266-7552  
Facsimile: 608-266-1784

cc: Parties in Interest

**STATE OF WISCONSIN**

**Department of Industry, Labor & Human Relations**

---

Anne Marie Peters,

Appellant

vs.

PECFA Claim 454491-9795-97

SECRETARY, Department of Industry,  
Labor & Human Relations,

Respondent.

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**Proposed Decision**

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**P R E L I M I N A R Y   R E C I T A L S**

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1. Whether the department's decision to deny petitioner's claim for Petroleum Environmental Cleanup Fund Act (PECFA) reimbursement based on §101.433(4)(g)2., Stats., was reasonable. The subissue is whether the claim can be considered fraudulent when all the invoices submitted as part of the claim were correct.
2. Whether the cost item for the tank removal by Cruzwood Landscaping in the amount of \$2225.00 is eligible for reimbursement.

There appeared at that time and place the following persons-.

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Anna Marie Peters  
128 N. Taylor Street  
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by.- Attorney James Sickel  
P O Box 1626  
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Department of Industry, Labor and Human Relations  
201 East Washington Avenue  
P.O. Box 7946

MADISON WI 53707-7946  
By: Mles Mickelson, PECFA Coordinator  
Bureau of Petroleum Inspection & Fire Protection  
P O Box 7969  
Madison WI 53707-7969

EXAMINER

Kristiane Randal, Assistant Legal Counsel  
Department of Industry, Labor and Human Relations

### FINDINGS OF FACT

1. Appellant Anna Marie Peters is the Secretary of Nomad Traders., Inc., which owns the gas station in White Lake, Wisconsin, which was the subject of PECFA claim #54491 9795-97.
2. In September, 1990, appellant had underground petroleum storage tanks removed from her property by Cruzwood Contractors. Cruz. R. Castro, the president of the company, gave appellant a written estimate of \$2,200 to remove the tanks. He required that 50% of the payment be made in advance. Appellant paid Mr. Castro \$1100 in cash. At the completion of the tank removal, appellant gave Mr. Castro a check in the amount of \$1125 for the balance of the cost for the tank removal. Mr. Castro gave appellant a receipt for the entire amount paid, \$2,225.
3. On November 7, 1991, REI completed a remedial action fund application on behalf of Nomad Traders, Inc., seeking reimbursement from the PECFA program. That application, received by the department on February 14, 1992, reported total dollar expenses of \$40,621.88. The Form 1 (Remedial Action Fund Application) was signed by Anna Marie Peters on November 7, 1991,
4. Supporting documentation for the remedial action fund application included a photocopy of check number 2252 drawn on an account at Associated Kellogg Bank of Green Bay, Wisconsin, in the name of Nomad Traders, Inc. The check was made out to "Cruzwood" in the amount of \$2225.00, dated September 28, 1990, and signed by Anna Marie Peters. The payment amount on the check had been altered by Anna Marie Peters from the original amount of \$1125.00 to \$2225.00. Similarly, the word "one" preceding the word "thousand" was changed to the word "Two," and the word "one" preceding the word "hundred" was changed to "two." In addition to the photocopy of the altered check, appellant also submitted an invoice from "Cruzwood, Box 31, Keshena 54135" in the amount of \$2235.00. The invoice included the notation "Paide [sic] in full." The receipt was on a blank form with no preprinted information identifying the vendor or the payer. The receipt did not itemize the cash and check payments. A cost detail worksheet for labor costs which was also submitted with the claim listed costs incurred from "Cruzwood" in the amount of "2,225.00."
5. The appellant altered the check because she had been asked by the consultant, REI, to provide receipts and canceled checks. She believed she would not be reimbursed by the PECFA program because she had made a portion of the payment to the excavating company in cash, and the check amount therefore did not agree with the amount on the receipt.
6. On December 1, 1992, Mary Ann Gosda, a PECFA grant reviewer contacted Vicki Pritzel at Associated Kellogg Bank and asked Ms. Pfitzel to "Please let me know what the check was actually canceled for." John P. Rose, Assistant Vice President for Associated Bank responded on January 8, 1993, with a copy of the check to Cruzwood which had actually cleared the bank. The check was made out in the amount of \$1125.00 and was endorsed by Cruzwood. Mr. Rose also later provided a second paid invoice from "Wisconsin Indian Superior Contractors" and a letter signed by Cruz

Castro stating that he performed the work for \$2,235 and was paid partially in cash. The receipt itself stated "cash payment 1/2 at start" and "finish. 1225,00 ck No (2252)."

7. On December 30, 1992, Miles Mickelson, Environmental Cleanup Fund Coordinator, notified appellant that the department had disqualified her entire request for reimbursement "because of an apparent submittal of fraudulent remedial invoices and proof of payment."
8. On November 15, 1990, Anna Marie Peters received from Michelle Channing, PECFA Program Assistant with the State of Wisconsin Bureau of Petroleum Inspection and Fire Protection, a PECFA eligibility letter for N2797 Highway 55 - WW, White Lake, Wisconsin. That letter contained an "Eligibility Overview", and at page 8 the Overview describes the claim application requirements. The last paragraph of that section on page 8 states "submit a completed claim application including copies of actual paid invoices to support costs claimed." The procedure communicated to Mrs. Peters did not require copies of canceled checks.
9. Both parties have stipulated to the addition of the second issue and waive the requirement for notice of that issue prior to the hearing.

## D I S C U S S I O N

This decision is being issued as a result of a request for rehearing. The first decision noted that while the statute requires the department to deny a claim if the "claimant submits a fraudulent claim," it did not define the term fraudulent. That decision assessed various definitions and court cases to conclude that "[w]hat appears to be contemplated by the PECFA statute for determining a claim is 'fraudulent' is that the applicant for PECFA reimbursement make false representations, that the applicant know the representation to be false, and the applicant make the representation with the 'intent to obtain reimbursement.'" I believe this statement of the elements of a fraudulent claim are appropriate and should be applied to this current decision. The definition distinguishes between intentional conduct, as opposed to accidental or negligent actions. And requires that the intent relate to obtaining reimbursement.

In this case, appellant admits she altered the check submitted to the department. She also admits that she did it to obtain PECFA reimbursement she did not believe she would if she did not alter the check to conform to the receipt, also submitted with the application, for the cash payments made to Cruzwood. I find that the facts of this case fall short of establishing a fraudulent claim, however. The fact that Mrs. Peters did submit an apparently accurate receipt for the payments for the services negates any inference that she was attempting to obtain reimbursement she would not otherwise have been entitled to. I cannot conclude on this record that Mrs. Peters intended to defraud the program.

This is not to say that Mrs. Peters' actions were particularly defensible or particularly honest. The statutes and rules governing the PECFA program do not make submission of altered documents a per se violation disqualifying the claim. By relying on the concept of fraud, they only make alterations and falsification with intent to obtain reimbursement for otherwise ineligible costs or claims a basis for disqualification. If the department wishes to disqualify claims for any falsification of documents, even where the costs are eligible, it needs to amend the rules.

This appeal does raise a secondary issue of whether, in light of the documents submitted to the department, including both the falsified check and the receipt for the full amount of the payments by cash and check, the appellant provided sufficient documentation to verify the cost items. This secondary issue was not noticed for hearing, however both parties presented evidence relating to the

eligibility of this cost item, and both parties have stipulated to the inclusion of this issue in the decision. Solely for purposes of administrative economy, to avoid a third hearing on this matter if it is not necessary, I am deciding this issue.

I conclude Mrs. Peters did not provide sufficient documentation to verify the cost item relating to tank removal. Thus, while I am holding that the department may not disqualify the entire claim, the department may disqualify the cost of the tank removal by Cruzwood because the supporting documentation was not clear and accurate. Since this appeal relates to the reasonableness of the decision made by the department, the appellant is limited to a large extent to showing that the department improperly assessed the information she provided to the department prior to its decision. While supplemental evidence at the hearing may be used to establish that the original submission was proper and the department's denial was unreasonable, entirely new submissions not previously given to the department despite an opportunity to do so cannot establish the department's original decision was incorrect or unreasonable.

In this case the evidence at hearing does not establish the credibility and accuracy of the original documentation submitted to the department to support the claim for costs associated with the tank removal. The evidence establishes that the verifying documentation consisted of an obviously altered check and two different receipts from Cruzwood which did not agree with the check amount and which did not agree with each other in terms of the identity and address of the contractor. This documentation was inadequate verification that the costs had been incurred and that the invoice had been paid.

#### C O N C L U S I O N S   O F   L A W

1. In order to deny an entire claim based on a decision that it is fraudulent, the department must establish a reasonable basis for concluding the claimant intentionally falsified or altered the documents submitted for the purpose of obtaining PECFA reimbursement.
2. The claimant can rebut the department's evidence by establishing that the claimant would have been entitled to the reimbursement amount claimed, even in the absence of the falsified or altered documents.
3. The claimant has established by greater weight of the credible evidence that the altered check was submitted to obtain payment she would otherwise have been entitled to.
4. The claim submitted to the department for PECFA reimbursement was not a fraudulent claim,
5. The documentation submitted to support the individual cost item of \$2225.00 for the tank removal was inconsistent, and while not fraudulent, did not verify the cost item. Denial of that particular cost item is reasonable.

#### O R D E R

That the department's decision denying the entire claim submitted by Mrs. Peters is reversed. The department must accept the claim and determine which cost items are eligible for reimbursement, except for the \$2225 cost item for the tank removal which is held to be ineligible. The department shall issue a check to Mrs. Peters for all other eligible cost items contained in her claim within 15 days from the date of the final decision in this matter.'-

## NOTICE TO PARTIES

This is a proposed decision issued pursuant to §227.46(2), Stats. Each party adversely affected by the decision may file written objections to the proposed decision and/or written arguments within 30 days from the date of this decision. Objections or arguments received more than 30 days after the date of this decision will not be included in the record. At the end of 30 days, the entire record, including the appeal and other correspondence, exhibits, the hearing examiner's notes, the tape recording of the hearing, and objections or arguments, if any, will be forwarded to the Deputy Secretary for a final written decision. If the final decision varies in any respect from the decision of the hearing examiner, the Deputy Secretary will include in the decision an explanation of the basis for each variance.

Objections and written arguments may be filed by mailing or taxing them to the hearing examiner at the address below. If the parties notify the hearing examiner they have no objections to the proposed decision, the file will be forwarded to the Deputy Secretary immediately,

Signed and dated in Madison, Wisconsin this 13th day of  
September, 1994.

Kristiane Randal, Hearing Examiner  
Department of Industry, Labor & Human Relations  
P O Box 7946  
Madison WI 53707-7946  
Telephone: 608-267-4433  
Facsimile-. 608-266-1784

**State of Wisconsin**  
**Department of Industry, Labor and Human Relations**

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*In the Matter of*

Anna Marie Peters

FINAL DECISION



128 N. Taylor Street  
Green Bay WI 54303

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P R E L I M I N A R Y   R E C I T A L S

Pursuant to a petition filed January 25 and March 30, 1993, under §101.02(6)(e), Wis. Stats., to review a decision by the Department of Industry, Labor and Human Relations, a preheating conference was held on April 5, 1993, by telephone at Madison, Wisconsin. The parties agreed that there were no substantial disputes regarding the facts, and that the documents submitted to the department in support of the claim constituted the evidence in the case. The hearing officer proposed three stipulations of fact based on the evidence, and the record was held open until May 21, 1993, for the parties to review stipulations of fact. Petitioner made no objection to the stipulations, however she submitted additional evidence and proposed three additional findings of fact. The additional evidence was admitted into the record and the proposed findings were adopted in part in this decision. The parties were given an opportunity to file arguments prior to a decision being issued.

The issue for determination is whether the department's decision to deny petitioner's claim for Petroleum Environmental Cleanup Fund Act (PECFA) reimbursement based on §101.433(4)(g)2., Wis. Stats., was reasonable. The subissue is whether the claim can be considered fraudulent when all the invoices submitted as part of the claim were correct.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

Anna Marie Peters  
128 N. Taylor Street  
Green Bay WI 54303  
By: Atty. James Sickel  
P O Box 1626  
Green Bay WI 54305

Department of Industry, Labor and Human Relations  
201 East Washington Avenue  
P.O. Box 7946  
MADISON WI 53707-7946  
By: Miles Mickelson PECFA Coordinator  
Division of Safety & Buildings  
P O Box 7969  
MADISON WI 53707-7969

EXAMINER: Kristiane Randal, Attorney.

Department of Industry, Labor and Human Relations

### FINDINGS OF FACT

- I. Appellant Anna Marie Peters is the owner of Nomad Traders in White Lake, Wisconsin. On November 7, 1991, appellant completed a remedial action fund application seeking reimbursement from the Petroleum Environmental Cleanup Fund (PECFA). That application; received February 14, 1992, reported total dollar expenses of \$40,621.89.
2. Supporting, documentation for the remedial action fund application included a photocopy of check number 2252 drawn from an account at Associated Kellogg Bank of Green Bay, Wisconsin, in the name of Nomad Traders, Inc. The check was made out to "Cruzwood" in the amount of \$2225.00, dated September 28, 1990, and signed by Anna Marie Peters. The payment amount on the photocopied check had been altered from \$1125.00 to \$2225.00. Similarly, in the payment amount written out on the check, the word "One" preceding the word "thousand" was changed to the word "Two", and the word "one" preceding the word "hundred" was changed to two". In addition to the copy of the check, appellant submitted an invoice from "Cruzwood, Box 31, Keshena 54135" in the amount of \$2235.00. The invoice included the notation "Paide [sic] in full." A cost detail worksheet for labor costs which was also submitted with the claim listed costs incurred from "Cruzwood" in the amount of "2,225.00".
3. On December 1, 1992, Mary Ann Gosda, a PECFA reviewer contacted Vicki Pritzel at Associated Kellogg Bank and asked Ms. Pritzel to "Please let me know what the check was actually cancelled for." John P. Rose, Assistant Vice President for Associated Bank responded on January 8, 1993, with a copy of the check to Cruzwood Contractors which cleared the bank. The check was issued for \$1125.00 and was endorsed by Cruzwood.
4. On December 30, 1992, Miles Mickelson, Environmental Cleanup Fund Coordinator, notified appellant that the department has disqualified her request for reimbursement "because of an apparent submittal of fraudulent remedial invoices and proof of payment." The denial describes the alteration of check number 2252 and also references "costs filed for reimbursement of remedial invoices that were not paid through checks that were not cancelled by the bank."
5. On January 12, 1993, Cruz R. Castro, president of Wisconsin Indian Superior Contractors, Inc., sent a letter to John Rose, Associated Bank of Green Bay, explaining what he had done in this matter. In his letter, Mr. Castro made the following statements. He estimated the cost for removal of the tanks on the Peters property to be \$2,220. Because the job was on the Menominee Reservation, he required a 50% down payment. On September 27, 1990, Mrs. Peters paid him \$1,110 in cash. The job was completed the next day. The balance of the job of \$1,125 was paid by check on September 28, 1990. The \$15 additional charge over the proposal was a charge for fill.
6. On November 15, 1990 Anna Marie Peters received from Michelle Channing, PECFA Program Assistant with the State of Wisconsin Bureau of Petroleum Inspection and Fire Protection, a PECFA eligibility letter for N2797 Highway 55 - WW, White Lake Wisconsin. That letter contained an "Eligibility Overview" and at page 8 the Overview indicates the "Claim Application Requirements." The last paragraph of that section on page 8 states "submit a completed claim application including copies of actual paid invoices to support costs claimed. " The procedure did not require copies of cancelled checks.

## DISCUSSION

Section 101.143(4)(g)2., Wis. Stats., provides that the "department shall deny a claim if ... [t]he claimant submits a fraudulent claim." The term "fraudulent claim" is not defined in the statute or in rules of the department. What constitutes a "claim" is clear. Section 101.143(3)(f), Wis. Stats., provides that

[a] claimant shall submit a claim on a form provided by the department. The claim shall contain all of the following documentation of activities, plans and expenditures associated with the eligible costs incurred because of a petroleum product discharge from a petroleum product storage system:

1. A record of investigation results and data interpretation.
2. A remedial action plan.
3. Contracts for eligible costs incurred because of the discharge and records of the contract negotiations.
4. Accounts, invoices, sales receipts or other records documenting actual eligible costs incurred because of the discharge.
5. The written approval of the department of natural resources under par. (c)4.
6. Other records and statements that the department determines to be necessary to complete the application.

On the face of the statute, then, a "claim" is the application form prescribed by the department and all of the supporting documentation described in the statute. It is not clear, however, exactly what is required to determine whether a claim is "fraudulent".

Black's Law Dictionary defines the term fraudulent as follows:

based on fraud; proceeding from or characterized by fraud; tainted by fraud; done, made, or effected with a purpose or design to carry out a fraud. ... [A]s distinguished from negligence, it always positive, intentional.

This definition is consistent with the concept of fraud used in Wisconsin in describing theft by fraud. To prove theft by fraud, one must demonstrate that

- (1) defendant made a false representation to the owner of the property;
- (2) defendant knew the representation to be false;

- (3) defendant made the representation with the intent to deceive and defraud the owner of the property;
- (4) defendant obtained title to the owner's property by the false representation;
- (5) the owner was deceived by the representation; and
- (6) the owner was defrauded by the representation.

State v. Kennedy, 105 Wis. 2d 625, 630-31 (Ct. App. 1981), quoting Wisconsin Jury Instructions - Criminal. In the case of the PECFA statute, however, the fraud does not have to be successful for a claim to be denied. The statute directs the department to deny a "fraudulent claim." This implies that the department would recognize the fraud prior to approving the application, giving up funds or being deceived or defrauded. What appears to be contemplated by the PECFA statute for determining a claim is "fraudulent" is that the applicant for PECFA reimbursement make false representations, that the applicant know the representation to be false, and that the applicant make the representation with the intent to obtain reimbursement.

In this case, petitioner does not deny that the amount of check number 2252 was misrepresented by the copy of the check submitted with the PECFA application, nor does she deny that she knew the check was altered. Rather, petitioner asserts she altered the check to obtain funds she was entitled to under the program. Petitioner argues that the department should not consider her claim to be fraudulent because the invoice from Cruzwood Landscaping submitted in support of the claim was correct, and she changed the check only to make it correspond to the invoice, which included both a payment in cash and also the payment by check number 2252 in the amount of \$1125.00. Petitioner argues further that since cancelled checks were not required to be submitted as part of the claim that the altered check cannot be considered as establishing a fraudulent claim.

I do not find the evidence presented by petitioner in support of her arguments to be credible. Petitioner would have the department believe that she paid over a thousand dollars to Cruzwood Landscaping without obtaining a receipt or paid invoice which could be submitted with her claim and that she altered the check merely to document a valid exchange. I am not convinced by the evidence presented that the cash payment was actually made. Petitioner presented no bank statements or other documentation that she withdrew the cash from an account and provided no satisfactory explanation of where the cash came from- What is in the record is a letter from John P. Rose, Assistant Vice President, Associated Bank which merely recounts Petitioner's "report" that "she became confused as to how to report a cash payment to Cruzwood Contractors." This letter is clearly hearsay and does not establish the truth of the matters asserted therein. Mr. Rose's letter also included a letter from Cruz Castro, President of Wisconsin Indian Superior Contractors stating that he performed the work for \$2,235 and was paid partially in cash.

Mr. Castro enclosed a hand written invoice dated September 29, 1990, which indicates "cash payment 1/2 at start" and "finish. 1225.00 ck No (2252)." The invoice submitted by Mr. Castro with his letter to Mr. Rose dated January 12, 1993, differs markedly from the receipt submitted with petitioner's PECFA claim. Mr. Cruz's receipt contains a preprinted address and phone number: "P.O. Box 1029, Keshena, Wisconsin 54135, 799-3888 or 799-4161." The hearing officer's copy of the receipt appeared to have been faxed, and a line above the address is partially visible. That line appears to say "Wisconsin Indian Superior Contractors." The receipt submitted to the department in the claim, along with the altered check, has a handwritten name and address "Cruzwood, Box 31, Keshena 54135." The receipt is on a blank form, with no preprinted information identifying the vendor or the payor. The description of the payment does not itemize the cash and check payments and states only that it was "Paide in full 9-29-90 2235.00."

I am seriously troubled by the extreme differences between the alleged invoice submitted in February 1992, with the claim and the invoice submitted by Mr. Castro in January, 1993, with his letter to Mr. Rose. On this record, I believe the invoice submitted with the claim was created to support the claim, and was not an invoice prepared by Cruzwood Landscaping. I believe that if the invoice containing the preprinted heading had actually been sent or given to petitioner at the time the payment was allegedly received in September, 1990, she would have not been "confused as to how to report a cash payment to Cruzwood Contractors." She would either have had the receipt in her files which detailed the receipt of two payments, or she would have been seen the receipt and known to ask for a copy directly from Cruzwood Contractors. On this record, I am unable to find either receipt credible, and I cannot conclude the department's decision to deny Mrs. Peters claim was unreasonable.

Thus with regard to petitioner's argument that the claim was not "fraudulent" because she would have been entitled to the reimbursement in any event, I find the handwritten invoice submitted with the claim to be just as "fraudulent" as the altered check. The preprinted invoice and letter from Mr. Castro did not surface until more than a year after the application was filed. On this record, I am not persuaded that petitioner would have been entitled to the funds, and I am not persuaded that either invoice was the "correct" amount of the transaction, and the check was altered merely to conform with the amount actually expended. Petitioner had an opportunity during these proceedings to submit evidence tending to show that the cash payment actually was made. The only evidence produced were the handwritten invoice and the completely dissimilar preprinted invoices. No explanation was given as to why there would even be two different paid invoices in existence. There were no bank records showing a withdrawal from petitioner's account or records showing a deposit to Cruzwood's account. Such records, showing the cash transaction in a sequence with other regularly recorded transactions, might have been persuasive. The evidence provided, however, raised more questions than it answered and did not convince me that petitioner was entitled to the payment.

I would note also that the Wisconsin Court of Appeals has considered this defense within the context of a theft by fraud prosecution. In State v. Kennedy, 105 Wis. 2d 625 (Ct. App. 1981), the court reviewed a verdict finding defendant Kevin Kennedy guilty of theft by fraud for submitting fraudulent medical assistance claims to the State. Dr. Kennedy argued that the claims were misrepresented as individual psychiatric examinations, but that he would have been entitled to payment had he accurately described the services rendered as consultation. Kennedy argued, similar to petitioner in this case, "that because he was entitled to compensation from the state for the services he performed, the state was not defrauded." *Id.*, at 638. The court acknowledged that the defense of "Obtaining what is justly due" is accepted in some jurisdictions, however in its decision the court joined "those jurisdictions rejecting the validity of this alleged defense." *Id.* The court stated

[w]e reject the validity of Kennedy's entitlement defense. The crime of theft by fraud is, as are all crimes, an offense against the people of the state of Wisconsin, and the victim's final accounting is irrelevant. To recognize the defense would be to sanction self redress through artifice and dishonesty. This we will not do, nor will we impute such intent to the legislature.

Id., at 640.

In the PECFA program, the legislature clearly intends for the department to require a certain type of documentation to support claims and to deny claims where the documentation contains misrepresentations. It would create an absurd result to assume the legislature intends for the department to ignore misrepresentations in the claim documents, to somehow ferret out what claimants are actually entitled to, and to approve claims so long as the amount in the misrepresented documents does not exceed

the amount claimants are "actually entitled to." Such a system would encourage fraud and waste in the program and result in exactly the type of "self redress through artifice and dishonesty" rejected by the court in Kennedy.

### **C O N C L U S I O N S   O F   L A W**

The department's decision to deny petitioner's PECFA application because it was a "fraudulent claim" was reasonable.

NOW, THEREFORE, it is

### **O R D E R E D**

That the department's decision denying petitioner's claim for PECFA reimbursement is sustained, and the petitioner's request for hearing is hereby dismissed.

### **REQUEST FOR A NEW HEARING**

This is a final administrative hearing decision. If you believe this decision is based on a mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not discovered sooner through due diligence. To ask for a new hearing, send a written request to Office of Legal Counsel, P. O. Box 7946, Madison, WI 53707-7946.

Send a copy of your request for a new hearing to all the other parties named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the hearing examiner made and why it is important. Or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request will have to be denied. Your request for a new hearing must be received no later than 20 days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in Sec. 227.49 of the state statutes. A copy of the statutes can be found at your local library or courthouse.

### **APPEAL TO COURT (PETITION FOR JUDICIAL REVIEW)**

You may also appeal this decision to Circuit Court in the county where you live by filing a petition for judicial review. Petitions for judicial review must be filed no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one). The appeal must be served on the Department of Industry, Labor and Human Relations, Office of Legal Counsel, 201 E. Washington Avenue, Room 400x, P. O. Box 7946, Madison, WI 53707-7946.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for judicial review is described in Sec. 227.53 of the statutes.

Given under my hand at the City of  
Madison, Wisconsin, this 10<sup>th</sup>  
day of September, 1993.

Kristiane Randal, Attorney  
Department of Industry, Labor and Human Relations  
090993kr